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COURT OF CRIMINAL APPEALS
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In the

COURT OF CRIMINAL APPEALS OF TEXAS

HAROLD MICHAEL MOORE,
Appellant,

v.

THE STATE OF TEXAS,
Appellee.

ON REVIEW OF THE SECOND COURT OF APPEALS' JUDGMENT AND OPINION IN CAUSE NO. 02-15-00402-CR

APPELLANT'S BRIEF ON THE MERITS

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IDENTITY OF PARTIES AND COUNSEL

The number and style of the case in the court below is as follows:

State of Texas v. Harold Michael Moore, trial court cause no. 1394673D

Criminal District Judge	Hon. George Gallagher
Second Court of Appeals	Hon. Terri Livington Hon. Anne Gardner Hon. Lee Ann Dauphinot
Defendant-Appellant	Harold Michael Moore
Plaintiff-Appellee	The State of Texas
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STATEMENT OF THE CASE

Appellant pleaded guilty to felony DWI and "true" to a repeat offender allegation. *See (*CR 5; 24-35); (2 RR 9-10.) He pleaded "not true" to a deadly weapon allegation. (CR 34); (2 RR 9.) Following a punishment hearing, the trial court found the deadly-weapon allegation to be true. (CR 33-34;); (2 RR 11-58.) The court sentenced Appellant to 18 years imprisonment, and ordered the sentence to run concurrently to a 10-year revocation sentence imposed in the same proceeding in cause no. 0961033D.[1] (CR 33-4); (2 RR 58;) (CR096: 40-41; 81-83.)

In his sole issue on appeal, Appellant challenged the legal sufficiency of the evidence to support a deadly weapon finding. The Second Court of Appeals sustained Appellant's claim of error and deleted the deadly weapon finding from the judgment. *See Moore v. State*. No. 02-15-00402-CR, 2016 Tex. App. LEXIS 8749 at *23. (Tex. App.—Fort Worth August 11, 2016, pet. granted). In a subsequent order, the appellate court granted the State's motion to publish the decision. *Moore v. State,* 2016

[1] Appellant raised no issue on direct appeal with regard to his revocation sentence. The Second Court of Appeals affirmed this judgment in Cause No. 02-15-00403-CR. *See Moore v. State*, 2016 Tex. App. LEXIS 8749 at *23 (Tex. App.—Fort Worth, August 11, 2016).

Tex. App. LEXIS 9866 (Tex. App.—Fort Worth, August 25, 2016). The State filed a petition for discretionary review with this Court, raising three issues for review. The Court granted the petition. *In re Moore*, 2016 Tex. Crim. App. LEXIS 1461 (Tex. Crim. App. December 7, 2016).

QUESTIONS PRESENTED

I. Did the Second Court of Appeals err in misapplying the *Jackson v. Virginia* legal sufficiency standard by holding evidence that Appellant was intoxicated, caused a wreck with a stationary occupied vehicle, and disregarded a red light was legally insufficient to support a finding the Appellant's vehicle was a deadly weapon?

II. Did the Second Court of Appeals err in holding that the infliction of minor injuries or "bodily injury" by the Appellant's vehicle rendered any actual danger of causing death or serious bodily injury purely hypothetical and thus insufficient to support a deadly weapon finding?

III. Does a deadly weapon finding in a felony driving while intoxicated require a *mens rea* of reckless conduct?

STATEMENT OF THE FACTS

Procedural History

Appellant Harold Michael Moore was indicted for driving while intoxicated ("DWI"), felony repetition (cause no. 1394673D, appellate cause no. 02-15-00403-CR), in violation of TEXAS PENAL CODE §§ 49.04 & 49.09(b)(2). (CR 5.) The indictment contained repeat offender and deadly weapon allegations. (CR 5.)

The offense took place on or about November 17, 2014. (CR 5.) During that time, Appellant was serving a ten-year probationary sentence for a separate felony DWI (trial court cause no. 0961033D; appellate cause no 02-15-00403-CR). *See* (CR 096: 40-41.) The State moved to revoke Appellant's probation alleging, *inter alia*, the new DWI offense. *See* (CR 096: 68-71.)

Pursuant to an open plea, Appellant pleaded guilty to the new felony DWI charge and true to the repeat offender allegation. *See* (CR 33-34); (2 RR 9-10). But he pleaded "not true" to the deadly weapon allegation. (CR 33-34); (2 RR 9.) Appellant additionally pleaded true to the State's

petition to revoke the existing probated sentence on the earlier DWI, also pursuant to an open plea.[2] (CR 096: 68=70; 74-77); (2 RR 9-10.)

A punishment hearing was then held. (2 RR 12-58.)

Relevant Facts

The following evidence was developed during the punishment hearing.

On November 17, 2014, at approximately 6:20-6:30 p.m., S.K. and her 14-year old daughter M.K. were stopped at a red traffic light on the 114 West access road, at its intersection with Dove Road. (2 RR 14-16.) S.K. was driving and M.K. rode in the front passenger seat of a 2011 BMW 328i. (2 RR 15.) S.K.'s foot was on the brake petal. (2 RR 17-18.) It was dark due to the time of day. (2 RR 22, 28.)

Their vehicle was second in line at the light, behind a white SUV. (2 RR 16.) The BMW was approximately four to five feet behind the white SUV. (2 RR 16.) Other vehicles were present. (2 RR 28.)

The two were talking on the phone with M.K.'s father via bluetooth when another car hit the back of their vehicle. (2 RR 17.) The collision

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[2] The State's petition contained no deadly weapon allegation and the Court entered no finding on a deadly weapon. *See* (CR 096 68-70; 81-83.)

caused the BMW to hit the white SUV in front of them, which in turn caused the white SUV to enter the intersection. (2 RR 17-18.) The driver of the white SUV drove through the intersection, pulled over on the shoulder on the other side, and turned on the hazard lights. (2 RR 18.) S.K. looked in the mirror and saw a black Mercedes SUV backing away from her vehicle. (2 RR 18.)

S.K. identified Appellant as the man driving the black SUV. (2 RR 19.) Appellant Harold ("Mickey") Moore is currently 69 years old. *See*, *e.g.,* (2 RR 39); (State Ex. 9.) He suffers from a congestive heart condition which requires the use of a pacemaker. (2 RR 42.) His lungs must be drained twice a year due to his congestive heart condition. (2 RR 42.)

S.K. never observed Appellant or his vehicle until after the accident had occurred. (2 RR 25-27.) At no time did she ever observe the manner in which Appellant had been driving his vehicle. (2 RR 25-27.)

S.K. told her husband to call 911. (2 RR 18.) She then put the BMW in park and put on the hazard lights. (2 RR 18-19.) After making sure her daughter was okay, S.K. got out of the car. (2 RR 19.) Appellant remained in his car initially but eventually exited and approached another

car. (2 RR 19-21.) A woman wearing scrubs approached S.K. and advised that Appellant smelled of alcohol. (2 RR 21.) The woman had been behind her at the intersection when the accident occurred. (2 RR 28.)

S.K.'s husband (M.K.'s father) arrived at the scene shortly thereafter. (2 RR 22.) He approached Appellant and asked him if he had been the man who hit his wife and daughter. (2 RR 22.) Appellant said yes. (2 RR 22.) Appellant's blood alcohol level was eventually found to be 0.27. (State Ex. 1)

After leaving the scene of the accident, M.K. and S.K. went to the hospital to seek medical treatment. (2 RR 22-23.) No injuries were found aside from bruises and scratches. (2 RR 22-23.) Both had some soreness in the days following the accident. (2 RR 23, 27-28.) Neither suffered loss or impairment of any bodily member or organ. (2 RR 27-28.) S.K., a real estate agent, missed no work as a result of the accident. (2 RR 27.) The accident caused some damage to the front and rear of the BMW. (State Ex. 10-12.)

Punishment

Based on the foregoing evidence, the trial court concluded that the vehicle was operated as a deadly weapon. (2 RR 58); (CR 33-38.) It sentenced Appellant to 18 years imprisonment on the new felony DWI. (2 RR 58.) On the earlier DWI, the trial court revoked the existing probation and imposed a sentence of 10 years imprisonment. (2 RR 58.) The sentences were ordered to run concurrently. (2 RR 58); (CR 33.)

Appeal

Appellant appealed to the Second Court of Appeals. In his sole issue on appeal, he challenged the sufficiency of the evidence with regard to the deadly weapon finding on his 18-year sentence. The Second Court of Appeals sustained Appellant's claim of error and deleted the deadly weapon finding from the judgment. *See Moore v. State*. No. 02-15-00402-CR, 2016 Tex. App. LEXIS 8749 at *23. (Tex. App.—Fort Worth August 11, 2016, pet. granted). Subsequently, the Court granted the State's petition for discretionary review.

SUMMARY OF THE ARGUMENT

The court of appeals correctly concluded that there was insufficient evidence to support a deadly weapon finding. A vehicle can be found to be a deadly weapon if it was 1) driven in a reckless or dangerous manner; and 2) placed others in actual danger of death or serious bodily injury. The evidence fails to satisfy either inquiry, let alone both.

First, there is no proof whatsoever that the Appellant drove his car in a reckless or dangerous manner. The evidence shows that a BMW containing two passengers was hit by Appellant's vehicle while the BMW was stopped at an intersection. This caused the BMW to hit the car in front of it. And Appellant was found to be intoxicated. But there was no evidence that Appellant had driven recklessly or dangerously. In fact there was no evidence at all as to how Appellant had been operating the vehicle. It had no eyewitness testimony of how Appellant had been driving prior to the collision. Nor did the State call any accident investigator to provide the factfinder with additional information, such as the car's speed at the time of the accident.

The State claims the reckless or dangerous prong was satisfied with proof of Appellant's blood alcohol level, the damage to the BMW, the fact that the BMW knocked a car in front of it, and the fact that Appellant disregarded a traffic signal. Appellant disputes the conclusion that Appellant "disregarded" a traffic signal; the accident took place behind the intersection and there was zero information on how the car was being driven. And none of the remaining evidence provides any insight into *manner* of operation of the vehicle; the results of the accident do not demonstrate that it could not have happened but for reckless or dangerous driving. In prior cases, this Court found recklessness or dangerousness where there was ample evidence in the record that Appellant had been driving in an erratic fashion. The mere fact that an accident occurred is insufficient, as such an accident could also have occurred even if someone had been driving carefully.

The State further complains that the court of appeals grafted a mental state on the recklessness inquiry. But the court of appeals' approach has foundation in this Court's precedent. In one case discussing deadly weapon recklessness, the Court specifically cited to the Penal Code

provision which defines the mental state of recklessness. And even if such a mental state had been inappropriate, the fact remains that the State still lacked evidence of Appellant's manner of use of the vehicle.

Without proof of recklessness or dangerousness, the Court need go no further. Nevertheless, the evidence fails also to establish that other people were put in actual danger of death or serious bodily injury. Actual danger must be real, and not merely hypothetical. And in this case, the accident victims suffered very minor injuries. Because Appellant's car directly hit the BMW with the accident victims, the evidence shows empirically the actual extent of the danger to which they were exposed, and it fell well short of death or serious bodily injury. In car collision cases, this Court has previously found actual death or serious bodily injury proves that a deadly weapon was capable of death or serious bodily injury. Similarly, proof that a car accident *did not* cause death or serious bodily injury should be evidence that others were not in actual danger of death or serious bodily injury.

The State emphasizes language in *Drichas* where this Court indicated that others would be in actual danger upon proof that other

motorists were in the area. But in that case there was ample proof of how the vehicle had been driven. Because there is no proof as to the manner in which the vehicle was driven, it would be purely hypothetical speculation to assume that the passengers were in some actual danger separate and apart from the accident itself. The judgment of the court of appeals should be upheld.

ARGUMENT AND AUTHORITIES

I. The court of appeals correctly concluded that there was insufficient evidence to support a deadly weapon finding.

A. Standard of Review

In reviewing the legal sufficiency of the evidence, this Court applies the familiar Constitutional standard: viewing the evidence in the light most favorable to the verdict, it must determine if any rational trier of fact could have found each of the essential elements of the offense to have been proven beyond a reasonable doubt. *See*, *e.g.*, *Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979); *Crabtree v. State*, 389 S.W. 3d 820, 824 (Tex. Crim. App. 2012). In this particular case, the inquiry is whether "any rational trier of fact could have found beyond a reasonable doubt that the vehicle

was used or exhibited as a deadly weapon." *Brister v. State*, 449 S.W. 3d 489, 493 (Tex. Crim. App. 2014).

B. Argument

The Texas Penal Code defines "deadly weapon," in relevant part, as "anything that in the manner of its use or intended use is capable of causing death or serious bodily injury." TEX PENAL CODE § 1.07(a)(17)(B) (emphasis added). In reviewing deadly weapon findings as applied to motor vehicles, this Court divides the inquiry into two parts. First, it reviews:

1) "the manner in which the defendant used the motor vehicle during the felony."

Second, it reviews:

2) "whether, during the felony, the motor vehicle was capable of causing death or serious bodily injury."

Sierra v. State, 280 S.W. 3d 250, 255 (Tex. Crim. App. 2009). The evidence fails to support either prong.

1) There is no evidence regarding the manner in which Appellant drove his vehicle, much less evidence that he drove the vehicle in a reckless or dangerous manner.

This Court has "never announced a specific standard for assessing a defendant's manner of driving," but "in past decisions [has] examined whether the driving was "reckless" or "dangerous." *Sierra*, 280 S.W. 3d at 255. Sufficiency of the evidence "is dependent upon *specific testimony in the record* about the manner of use." *Brister,* 449 S.W. 3d at 494 emphasis added).

In this case, the record is devoid of any evidence whatsoever regarding the manner in which Appellant drove his vehicle. All that is known is that Appellant's vehicle effected contact with another vehicle that was stopped at a traffic light. The State's only witness never observed Appellant or his vehicle until after the accident had already occurred. (2 RR 25-27.) And the State called no accident investigator to reconstruct what happened or provide additional details, such as an estimate of the speed at which Appellant had been traveling.

The mere fact of a car accident cannot in and of itself support a finding that Appellant had driven his car recklessly or dangerously. As

the court of appeals correctly observed, such a finding would require a rational trier of fact to conclude beyond a reasonable doubt that "the accident would not have occurred but for Appellant's having driven his car in a reckless or dangerous manner." *Moore*, 2016 Tex. App. LEXIS 8749 at *13. Such a finding lacks any foundation. Based on the known evidence, this collision could have occurred even where a driver follows every traffic law and takes every necessary precaution. It also sets a dangerous precedent that "evidence of a rear-end collision, by itself, establishes in every case that a vehicle was used as a deadly weapon. *Moore*, 2016 Tex. App. LEXIS 8749 at *22.

In other cases where this Court upheld deadly weapon findings, it had "specific testimony in the record," *Brister*, 449 S.W. 3d at 494, about "the *manner* in which the defendant used the motor vehicle." *Sierra*, 280 S.W. 3d at 250 (emphasis added). *See Sierra* 280 S.W. 3d at 256 (evidence showed that defendant could have avoided the collision but failed to do so, and that he was speeding); *Drichas v. State*, 175 S.W. 3d 795, 797 (2005) (evidence showed that defendant had "led law enforcement officers from three agencies on a fifteen mile high-speed chase," during which he

"disregarded traffic signs and signals, drove, erratically, wove between lanes and within lanes, turned abruptly into a construction zone, knocking down barricades as he did so, and drove on the wrong side of the highway"); *Tyra v. State*, 897 S.W. 2d 796, 798 & 805 (Tex. Crim. App. 1995) (concluding that defendant was "too drunk to control the vehicle;" defendant drove vehicle "at a high rate of speed estimated at eighty miles per hour, toward a signal-controlled intersection, 'jumping' a median and nearly colliding with another vehicle; closing on the intersection where other vehicles were honoring a red light, he drove his pickup against the rear or left side of a motorcycle operated by one William Durbin with such force that the motorcycle was propelled forward into the rear of another standing vehicle, fatally injuring Durbin")[3]; *Mann v. State*, 13 S.W. 3d 89, 90, 92 (Tex. Crim. App. 2000) (defendant drove "completely along the south curb before returning to the roadway;" defendant then drove in a straight line as the street curved, "almost hit[ting] another vehicle head-on when [his] vehicle crossed the center line.").

[3] Some of these facts were from the dissenting opinion. *See Tyra*, 897 S.W. 2d at 805 (Clinton, J., dissenting).

By contrast, in this case, there is no such evidence. The State presented no evidence about the how the vehicle was being driven before it effected contact with S.K.'s BMW. It presented "no evidence on how fast Appellant was driving or what the speed limit was at that location." *Moore*, 2016 Tex. App. LEXIS 8749 at *9. Such evidence presumably could have come from an accident investigator; but no such person was called.

The State points to the damage to S.K.'s BMW, and the fact that the BMW in turn rear-ended another vehicle. *See* (State Br. at 9.) But this evidence fails to provide any insight into the *manner* in which Appellant drove his vehicle; such damage could just as plausibly arise even if Appellant had been conscientiously driving.

The State further emphasizes the fact that an insurance adjuster deemed the car "totaled." (State Br. at 9.) Whether a vehicle is "totaled" for insurance purposes provides a poor window into the level of damage a vehicle may have sustained. Even if the fact the vehicle was "totaled" did have value, it still fails to shed light on the manner in which Appellant had been driving his car. As the court of appeals observed, the car could

have been totaled "as a result of reckless driving . . . or negligent driving." *Moore*, 2016 Tex. App. LEXIS 8746 at *14. Appellant agrees this conclusion in part, though he would submit that the car could have been totaled even if Appellant had been driving conscientiously.

The State also claims that Appellant "disregarded a light at an intersection." (State Br. at 9.) Appellant disputes that the evidence demonstrates that he disregarded a light at an intersection. The accident took place behind the intersection, not in the intersection; S.K. was second in line at the intersection and four-five to feet behind the SUV in front of her. (2 RR 16-18.) The court of appeals appears to acknowledge that Appellant may have disregarded a traffic signal, though it concludes that such evidence fails to trigger a finding of recklessness or dangerous. *Moore*, 2016 Tex. App. LEXIS 8749 at *10.

This leaves only the State's argument that Appellant had a high blood alcohol level. (State Br. at 9-10.) This argument fails on precisely the same grounds as the others cited by the State. Appellant's level of intoxication does not provide insight into "the *manner* in which the defendant used the motor vehicle during the felony." *Sierra*, 280 S.W. 3d

at 255 (emphasis added) . "'Intoxicated' describes the condition in which Appellant drove his vehicle. It does not describe the manner in which he drove his vehicle." *Moore*, 2016 Tex. App. LEXIS 8749 at *8. Intoxication may explain *why* we observe someone is driving in a reckless or dangerous manner. But it does not reveal that someone had in fact been driving their vehicle recklessly or dangerously.

This position accords with *Brister*, where this Court refused to find that driving while intoxicated gives rise to a deadly weapon finding *per se*. *Brister*, 449 S.W. 3d at 495. Instead, the Court looked at the manner in which Brister drove his vehicle, as well as the danger the vehicle posed to others, and concluded that no reasonable factfinder could find that he had "used his motor vehicle as a deadly weapon." *Brister*, 449 S.W. 3d at 495. The court upheld this finding even though appellant had committed a traffic violation, "briefly cross[ing] the center line into the oncoming lane of traffic." *Id.* And the Court gave no indication that intoxication would trigger a deadly weapon finding if the BAC was high enough. *See id.* at 494-95.

The government further complains that the court of appeals improperly attached a *mens rea* to the recklessness inquiry. *See* (State Br. at 11-12.) But this Court has indicated otherwise. In *Sierra*, the Court noted that "in past decisions, [it has] examined whether a defendant's driving was reckless or dangerous" during the commission of a felony. *Sierra*, 280 S.W. 3d at 255. The Court attached footnotes to both the words "reckless" and "dangerous" with case citations. *See id.* at 255 & ns. 30, 31. But in footnote 30, the footnote attached to "reckless," the Court specifically cited to Section 6.03(c) of the Penal Code. *See id.* at n. 30 (citing *inter alia* TEX. PEN. CODE § 603(c)). Section 6.03 provides the "Definitions of Culpable Mental States" and subsection (c) in particular defines the reckless mental state. *See* TEX. PENAL CODE § 6.03(c). The court of appeals thus appears to have correctly interpreted the definition of reckless when conducting its vehicular deadly weapon inquiry. *See Moore*, 2016 Tex. App. LEXIS 8749 at *14-15.

However, even assuming *arguendo* the State is correct that no mental state attaches to recklessness, it remains in precisely the same

position. (State Br. at 11-12.) It still cannot provide any evidence whatsoever about the "manner" in which Appellant drove his vehicle.

2) The accident posed no actual danger of death or serious bodily injury.

Because the government cannot demonstrate that the vehicle was being driven recklessly or dangerously, the second inquiry as related to a deadly weapons finding is unnecessary. But assuming *arguendo* the Court could uphold a finding that Appellant's vehicle was being driven in a reckless or dangerous manner, it cannot conclude beyond a reasonable doubt that "the motor vehicle was capable of causing death or serious bodily injury." *Sierra*, 280 S.W. 3d at 255.

The capability inquiry depends on whether the vehicle "posed an *actual* danger *of death or serious bodily injury*." *Brister*, 449 S.W. 3d at 494 (emphasis added). And "*actual* danger means one that is not merely hypothetical." *Id.* (quoting *Drichas*, 175 S.W. 3d at 797-98). The vehicle must have "placed others in *actual* danger of *death or serious bodily injury*." *Id.* at 495 (emphasis added).

In a car accident case, the empirical result can provide an excellent gauge of whether others were placed in actual danger of death or serious

bodily injury. Thus, in *Sierra*, this Court found the capability inquiry was satisfied because the SUV "did indeed cause serious bodily injury to Pacheco." *Sierra*, 280 S.W. 3d at 256. As the Court observed in *Tyra,* "a thing which actually causes death, is by definition 'capable of causing death.'" *Tyra*, 897 S.W. 2d at 798 (capability inquiry satisfied because defendant killed a man).

Similarly, the fact that a car accident involving others did not in fact cause their death or serious bodily injury provides compelling evidence that such individuals were not put in "*actual* danger of death or serious bodily injury." *Brister*, 449 S.W. 3d at 494. S.K. and her daughter were in no actual danger *"of* death or serious bodily injury." As the court of appeals observed, this "was a direct-hit case." *Moore*, 2016 Tex. App. LEXIS 8749 at *17. The court of appeals drew a distinction between "near miss" and "direct hit" cases. As a direct hit case, "we know precisely the extent of danger they were exposed to because of the accident, and the extent of their injuries shows that the danger does not meet the definition of death or serious bodily injury." *Moore*, 2016 Tex. App. LEXIS at 8749.

And that direct hit caused only bruises, scratches, and general soreness, with no protracted impairment of any bodily organ. (2 RR 22-23, 27.)

The State complains that this formulation increases its burden, because it need only prove that the vehicle was "capable" of causing death or serious bodily injury. (State Br. at 14-15.) But the capability determination specifically requires proof of an actual as opposed to a hypothetical danger of death or serious bodily injury. *Brister*, 449 S.W. 3d at 494. With no evidence regarding the manner in which Appellant had been driving his vehicle, there is no evidence that the accident victims were in any danger beyond what actually occurred.

The State cites language in *Drichas* in support of its position, though this case only brings into relief its lack of evidence in this particular case. Specifically, the State cites language where the Court observed that a "deadly weapon is appropriate on a sufficient showing of actual danger, such as evidence that another motorist was on the highway at the same time and place as the defendant *when the defendant drove in a dangerous manner*." *Drichas*, 175 S.W. 3d at 799 (emphasis added). The italicized language is important, because here again the State runs into its same

problem; it simply has no evidence pertaining to the manner in which Appellant had been driving his vehicle. By contrast, in *Drichas* the evidence showed that the defendant had "led law enforcement officers from three agencies on a fifteen mile high-speed chase," during which he "disregarded traffic signs and signals, drove, erratically, wove between lanes and within lanes, turned abruptly into a construction zone, knocking down barricades as he did so, and drove on the wrong side of the highway." *Drichas v. State*, 175 S.W. 3d at 797.

Perhaps the case would be different if the State actually had evidence that Appellant had been driving his vehicle dangerously leading up to and at the time of the collision. With more information as to the manner in which Appellant had been driving, perhaps it could have shown that the accident victims had been lucky to have only sustained minor injuries; that minor injuries notwithstanding, Appellant had been driving his vehicle in a way so dangerous that they were, in fact, in "actual danger of death or serious bodily injury." *Brister*, 449 S.W. 3d at 494. Perhaps also in that circumstance, it could have shown that other motorists on the

road were in actual danger, even if those motorists did not collide with Appellant.

But without more evidence as to the *manner* in which Appellant was driving, these dangers are purely hypothetical. *Brister*, 449 S.W. 3d at 494 ("actual danger means one that is not merely hypothetical" (quoting *Drichas*, 175 S.W. 3d at 797-98)). They rest on pure speculation, which the court of appeals rightly concluded will not suffice. *See Moore*, 2016 Tex. App. LEXIS 8749 at *18 ("[a]rguments that the danger was greater and that the injuries could have been or should have been greater are speculation, and speculation is not proof beyond a reasonable doubt.")

Without evidence as to the manner in which Appellant was driving, the evidence on actual danger is limited to the known evidence about the accident itself. And we know, empirically, that the accident itself caused only minor injuries to the accident victims, specifically bruises, scratches, and soreness. (2 RR 22-23; 27-28.) The accident did not put S.K. and M.K.. in actual danger of death or serious bodily injury. On this record, the analysis starts and ends there. Without information as to Appellant's

manner of driving, it wholly unknown and purely hypothetical whether the victims faced an actual danger beyond what we know occurred.

The current deadly-weapon finding renders Appellant ineligible for parole for nine years, or until half of his 18-year sentence is completed. *See* TEX. CODE CRIM. PROC. ART. 42.12 § 3g(a)(2); TEX. GOV'T. CODE § 508.145. Appellant is currently 70 years old and suffers from a congestive heart condition (2 RR 39; 42); (State Ex. 9.). Absent this finding, he would be eligible for release when his actual time plus good conduct time equals one-fourth of the sentence imposed. *See* TEX. GOV'T. CODE § 508.145(f). A finding of such consequence should and must be based on proof *beyond a reasonable doubt* and not pure speculation. *See Moore*, 2016 Tex. App. LEXIS 8749 at *18 (speculation is not proof beyond a reasonable doubt)*;see*, *e.g.*, *Jackson*, 443 U.S.at 318-19 (1979); *Crabtree*, 389 S.W. 3d at 824. The Court should uphold the judgment of the Second Court of Appeals.

PRAYER

WHEREFORE, PREMISES CONSIDERED, Appellant respectfully prays that this Court will overrule the State's grounds for review and uphold the judgment of the Second Court of Appeals.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this Brief was prepared with WordPerfect X7, and that according to that program's word-count function, the entire document contains 5,406 words. Thus, the brief complies with Rules 70.3 and 9.4(i)(2)(B) of the Texas Rules of Appellate Procedure.

/s/ William R. Biggs
WILLIAM R. BIGGS

CERTIFICATE OF SERVICE

I hereby certify that on February 21, 2017, I filed a copy of the foregoing electronically. The State will receive electronic notice and service of this filing at coaappellatealerts@tarrantcounty.com. Once the clerk approves this brief, I will send a filemarked copy of this brief by certified mail to Harold Michael Moore, TDCJ No. 02028926, Jester III Unit, 3 Jester Rd., Richmond, TX 77406.

/s/ William R. Biggs
WILLIAM R. BIGGS